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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MELVYN CARSON BRUDER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITIONER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is consistent with the right of procedural due process for the State of Texas to forfeit Petitioner's non-contraband property with no right of notice or hearing?

2. Whether it is consistent with the Equal Protection Clause of the Fourteenth Amendment for the State of Texas to forfeit bribe money used solely as evidence without notice or hearing when these procedural rights are secured when the State of Texas seeks to forfeit both monies and instrumentalities used in other crimes?

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THE STATE OF TEXAS

Respondent.

PETITIONER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner, Melvyn Carson Bruder, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered herein on February 11, 1981.

OPINION BELOW

The only written opinion in this case is that of the Texas Court of Civil Appeals for the Fifth Supreme Judicial District, which is reported at 601 S.W.2d 102 (Tex.Civ.App. – Dallas 1980, writ ref'd, n.r.e.), a copy of which is contained herein as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S.CONST.AMEND.XIV provides, in relevant part:

> * * * [N]or shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts of this case are contained in a stipulation of facts, agreed to by the Petitioner and the State of Texas. Such agreed stipulation of facts is set out verbatim in Appendix B herein.

The Petitioner is the assignee of $6,400.00 that had been given by a third person to a policeman as a bribe. The policeman took the money to hold as evidence of the bribe; therefore, he was not *in pari dilecto* with the briber. The State held the money only as evidence pending the trial of the briber. The money originally belonged to the briber.

The briber was convicted of bribery and his case is final in every respect.

In the trial court and in Petitioner's first brief in the Court of Civil Appeals he argued that the forfeiture he had suffered by the judgment of the trial court violated Texas' separation of powers doctrine, TEX.CONST.art. II, § 1; Texas; due process clause, TEX.CONST.art. I, § 19; and the statutory rights guaranteed in TEX.PENAL CODE ANN. § 12.01(c) (Vernon 1974), which allows for forfeitures by trial courts only "when conferred by law."

Because the Petitioner had a hearing at the trial court level, he had no reason to complain before the Court of

Civil Appeals that he had been deprived of his federally secured rights of procedural due process and equal protection.

The opinion of the Court of Civil Appeals (Appendix C), however, irrefutably demonstrates that that court intentionally bypassed any discussion of the Petitioner's state constitutional and statutory rights on the specious ground that he was "barred from establishing any right to the money" (i.e., he had not pleaded a cause of action) because he chose to rest his claim on the unlawful act of bribery. The court's opinion missed the mark because the petitioner was not seeking to enforce any rights which arose from the illegal act of bribery, but, to the contrary, he merely sought enforcement of the property right to the money, title to which never left the assignor/briber, as shown by the stipulated facts that the policeman did not accept the money as a gift, did not perform the services sought by the assignor/briber, accepted the money only as evidence, and delivered the money to the State of Texas to use as evidence against the assignor/briber.

Upon the rendition of the opinion of the Court of Civil Appeals, the Petitioner filed a timely amended motion for rehearing alleging, *inter alia,* that "[t]he jugdment of the Court deprived [the Petitioner] of his property contrary to the due process clause of the Fourteenth Amendment of the United States Constitution" and "The judgment of the Court deprived [the Petitioner] of his rights contrary to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."

The rights to notice and hearing granted by the trial court in the first instance were taken away by the intermediate appellate court in that court's opinion rendered herein. When the Petitioner raised his federally secured rights on rehearing in the Court of Civil Appeals, he did so

at the earliest moment possible, consistent with the procedural principles enumerated by this Court in *Missouri ex re. Missouri Insurance Co. v. Gehner,* 281 U.S. 313, 320 (1930). The appellate courts of Texas denied the Petitioner all process by refusing to rule on his substantive claims bottomed upon state law, and by failing to address his federal questions.

After having his motion for rehearing denied in the intermediate appellate court, the Petitioner applied for a writ of error to the Texas Supreme Court. On October 29, 1980, that court refused his application for writ of error. as a final prerequisite for seeking review in this Court, the Petitioner timely filed a motion for rehearing on his application for writ of error. On February 11, 1981, the Texas Supreme Court overruled such motion.[1]

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[1]The writ of error was refused with the notation "No Reversible Error." This was done pursuant to TEX.R.CIV.P. 483 which provided at the time:

> "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused, No Reversible Error."

REASONS FOR GRANTING THE WRIT

1. THE DENIAL OF PROCEDURAL DUE PROCESS

> No freeman shall be hurt in person nor property *nisi per legale judicium parium suorum rel per legem terrae.* Magna Charta ch. 39. 3 W. BLACKSTONE, COMMENTARIES 350

If the right to be heard from and the right to be told why constitute procedural due process, then the omissions by the State of Texas should not be ignored by this Court. Notice and hearing provide the necessary interaction between the single citizen and the often times overly powerful government to give "validity and moral authority" to the conclusion reached by the machinery provided by the government. "Nor has a better way [than notice of the case against the citizen and an opportunity to meet it] been found for generating the feeling, so important, to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123 171-172 (1951) (Frankfurter, J., concurring).

The jurisprudential *mauvaise foi* of the Texas judiciary in this case is striking. The Petitioner was granted notice and hearing at the trial court level, but the intermediate and terminal state appellate courts refused to consider any of the constitutional or statutory claims properly brought forward and held that no hearing of any kind was a necessary prerequisite to the taking of the Petitioner's property.

Texas has not statute concerning the disposition of bribe money; but it does have a general statute that covers forfeitures in criminal cases:

> This chapter does not deprive a court of authority *conferred by law* to forfeit property, dissolve a

> corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt, or impose any other civil penalty. The civil penalty may be included in the sentence.

TEX. PENAL CODE ANN. § 12.01(c) (Vernon 1974).[2] (Emphasis added.)

It cannot be gainsaid that notice and hearing are absolute prerequisites for the various categories of property or liberty rights which are subject to forfeiture under § 12.01(c). The Petitioner assumed that within the Texas judicial system § 12.01(c) of the Penal Code contained a guarantee of procedural due process under an entitlement approach. *Bell v. Burson,* 402 U.S. 535, 539-540 (1971).

The amount of due process which is due may vary from one situation to another, but whether one commences with a positivist-statutory entitlement approach, *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Board of Regents v. Roth,* 408 U.S. 564 (1972), or the broader, more substantive oriented pre-1970's general right (natural law) to notice and hearing when the deprivation of any property or liberty interest is at stake, *Twining v. New Jersey,* 211 U.S. 78, 110-111 (1908); *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223 (1864); *Mellane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), the case presented here is

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[2]The disposition and derivation tables of the Texas Penal Code (Vernon 1979) show that § 12.01(c) is the direct successor to article 51 of the former penal code, which read: "When a convict is imprisoned in the penitentiary, his property shall be controlled by law; but there shall in no criminal case be a forfeiture of property of any kind to the state." TEX. PENAL CODE ANN. art. 51 (Vernon 1952). Thus, § 12.01(c) was a *pro tanto* repeal of article 51. See also MODEL PENAL CODE § 6.02(5) (1974). ALI MODEL PENAL CODE OF PRE-ARRAIGNMENT PROCEDURE, Tent. Draft No. 3, § 7.03(3) (April, 1970).

one of no process at all, and therefore wholly violative of the Fourteenth Amendment.

Not only is there no statutory authority for forfeiting bribe money in Texas, but the claims made by the Petitioner under § 12.01 of the Texas Penal Code, *supra,* which would presumptively have given him some rights, went unaddressed, as did the federal and state constitutional claims.

Perhaps it is because of the separation of powers doctrine, *J. W. Hampton Jr., & Co. v. United States,* 276 U.S. 394, 405-406 (1928), that Congress felt impelled to pass statutes which give the Government the right to forfeit bribe money. 18 U.S.C. § 3612,; 28 U.S.C. § 2042. The courts are not to impute to Congress superfluous or meaningless acts when considering legislation, *Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977), and since bribe money is not contraband *per se,* its disposition by way of forfeiture is a consideration which properly belongs to the legislative branch of government — not to the judiciary.

This Court indicated that "mere evidence" does not belong to the government when it wrote:

> For just as the suppression of evidence does not in itself necessarily entitle the aggrieved person to its return (as, for example, contraband), the introduction of "mere evidence" does not in itself entitle the State to its retention.

Warden v. Hayden, 387 U.S. 304, 307-308 (1967). Implicit in this statement is the notion that before the State is entitled to retain evidence in its possession, proceedings must be had at which the State must demonstrate a basis for retention of the evidence; and, of course, such proceedings must necessarily involve procedural due process.

The *ratio decidendi* of the intermediate appellate court in this cause was a non-binding[3] decision of an equal and coordinate court of civil appeals, viz., *Heard v. Denman,* 29 S.W.2d 824 (Tex.Civ.App. – Austin 1930, no writ). In *Heard,* the appellant also raised the issue of denial of "due course of the law" under TEX.CONST.ART. I, § 19, Brief for Appellant at 10, but his plea, as in this case, was unaddressed.

Subsequent to *Heard,* the Texas Supreme Court, in a decision that was binding on the lower Texas courts,[4] answered a question certified to it on the issue of forfeitures and due process, and the court held that common law forfeitures had no place in Texas and could constitutionally be accomplished *only* through the reasonable exercise of the police power of the State through the legislative process. *State v. Richards,* 301 S.W.2d 597, 601 (Tex. 1957).

Richards was argued to the intermediate appellate court in this case, but it was not cited in the only written opinion in this case. Brief for Appellant at 8-9, 12. *Bruder v. State, supra.*

Texas' action in taking away the procedural rights of the Petitioner and the failing to address any of his claims at the appellate level constitute a gross deviation from the due process standards required by the Fourteenth Amendment, and should not be allowed to go unnoticed under the guise of the "No Reversible Error" notation given to this case by the Texas Supreme Court. Certiorari should be granted to accord the Petitioner the due process of law to which he is entitled as regards his claim for the evidence, i.e., the bribe money, that he seeks.

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[3]*See,* e.g., *Shook v. State,* 244 S.W.2d 220, 221 (Tex.Crim.App. 1951).

[4]*See,* e.g., *Swilley v. McCain,* 374 S.W.2d 871, 875 (Tex. 1964).

2. THE DENIAL OF EQUAL PROTECTION

While the treatment of the ultimate disposition of bribe money is a question that falls under the umbrella of the police power of the State of Texas, this power may not be exercised in an arbitrary fashion without offending the Fourteenth Amendment. *Morey v. Doud,* 354 U.S. 457, 463-464 (1957).

Cognizant of the fact that the forfeiture of property falls within the police power of the state, the Texas legislature has enacted several statutes specifically authorizing the forfeiture of property in specific instances. TEX.REV.CIV.STAT.ANN. Art. 4476-15, §§ 5.03(a)(1)-(6), 5.05, 5.06, 5.07 (Vernon Supp. 1980), authorizes the forfeiture of vehicles and money related to the transportation, sale, manufacture, distribution and delivery of drugs. TEX.CODE CRIM.PRO.ANN. Art. 18.18 (Vernon 1977), provides for the forfeiture of gambling devices and paraphernalia, gambling proceeds, prohibited weapons and criminal instruments. TEX.ALCOHOLIC BEV. CODE ANN. §§ 103.03, 103.14, 103.16 and 103.17 (Vernon 1978), allows for the forfeiture of illicit beverages, vehicles used to transport illicit beverages, and materials and equipment used to manufacture illicit beverages. None of the items subject to forfeiture under these statutes are contraband *per se,* just as bribe money is not contraband *per se.* In each of the statutes providing for the forfeiture of property, the Texas legislature specifically provided that forfeiture of property could only be had after notice and hearing.

If the Petitioner had possessed an assignment of money derived from the sale of a drug, or if he had possessed an assignment of money derived from gambling, he would have been entitled to notice and hearing under the relevant forfeiture statutes. No doubt money employed in the at-

tempt to bribe a policeman carries with it an odious character, but Texas' answer to the Petitioner that he cannot even state a cause of action because he was seeking to enforce a claim arising out of or based upon an illegal act does not come close to comporting with the facts because no claim from the bribe was involved in this case. All that the Petitioner sought to litigate was the title to property which in thaumaturgic fashion shifted to the State of Texas from the Petitioner even though it was not a gift, but was held as "mere evidence." This was purely an arbitrary exercise of judicial fiat by the Texas courts.

Quite obviously Texas' judicial classification of bribe money need not pass an standard of review more rigorous than the rational relation test, *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911), but at the same time the classification, even under this standard, can not be arbitrary, and "all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

When other Texas citizens who are either the defendant or the assignee of the defendant of property used in crimes involving drugs, alcohol, or gambling are entitled to notice and hearing before their non-contraband property can be forfeited, but the Petitioner is denied those rights only because the property involved happens to be of a kind of the Texas legislature presumptively overlooked or did not care to classify as forfeitable, he is perforce similarly situated as the former persons, but not treated as they are. His Fourteenth Amendment rights to equal protection have been violated.

CONCLUSION

The actions of the Texas judiciary in depriving the Petitioner of any right to notice and hearing, of not consider-

ing his state constitutional and statutory claims, and of not considering his federal constitutional claims deprived the Petitioner of his rights to procedural due process guaranteed under the Fourteenth Amendment to the United States Constitution. The ruling of the Texas courts which treated the subject matter of this case differently from personal property used in other crimes deprived the Petitioner of his rights to equal protection as guaranteed under the Fourteenth Amendment to the United States Constitution.

PRAYER

Your Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Texas, to review the judgment of the court, and upon hearing hereof, your Petitioner prays that this Honorable Court reverse the judgment of the Supreme Court of Texas and remand the cause for further proceedings to enforce the Petitioner's due process and equal protection rights.

Respectfully submitted,

GEORGE A. PRESTON, Jr.
P.O. Box 428
County Courthouse
Denton, Texas 76201
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I, George A. Preston, Jr., hereby certify that I have sent a copy of the foregoing petition for writ of certiorari to the Attorney General of Texas, the Honorable Mark White, by United States mail, pursuant to Rule 28.3 of the Rules of this Court, on April 11, 1981. I further certify that I am a member of the Bar of this Court.

GEORGE A. PRESTON, Jr.

APPENDIX A

Relevant provisions of the Texas Constitution and Texas statutes

TEX.CONST.art. I, § 19, provides:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX.CONST.art. II, § 1, provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX.REV.CIV.STAT.ANN.art. 4476-15, §§ 5.03, 5.05, 5.06, 5.07 (Vernon Supp. 1980), provides:

Forfeitures

Sec. 5.03 (a) The following are subject to forfeiture as authorized by this subchapter:

(1) all controlled substances that are or have been manufactured, distributed, dispensed, delivered, acquired, obtained, or possessed in violation of this Act;

(2) all raw materials, products, and equipment of any kind that are used, or intended for use, in manufacturing,

compounding, processing, delivering, importing, or exporting any controlled substance in violation of this Act;

(3) all property that is used, or intended for use, as a container for property described in paragraph (1) or (2) of this subsection:

(4) all books, records, and research products and materials, including formulas, microfilm, tapes, and data that are used, or intended for use, in violation of this Act;

(5) any conveyance, including aircraft, vehicles, vessels, trailers, and railroad cars, that is used or intended for use to transport for delivery or in any manner facilitate the transportation for delivery of any property described in paragraph (1) (2), or (3) of this subsection, provided that no conveyance used by any person as a common carrier shall be forfeited under this subchapter unless the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this Act, and no conveyance shall be subject to forfeiture if the delivery involved is an offer to sell;

(6) all money derived from the sale, manufacture, distribution, dispensation, delivery, or other commercial undertaking violative of this Act.

Notification of forfeiture proceedings

Sec. 5.05.(a) When any property, other than a controlled substance or raw material, is seized, proceedings under this section shall be instituted within ten (10) days after the seizure and not thereafter.

(b) the seizing officer shall immediately cause to be filed in the name of the State of Texas with the clerk of the district court of the county in which the seizure is made, or if the property is a conveyance, in any county in which the conveyance was used or intended for use to transport for

delivery or in any manner facilitate the transportation for delivery of any property described in Paragraph (1), (2) or (3) of Section 5.03(a), a notice of the seizure and intended forfeiture. Certified copies of the notice shall be served upon the following persons as provided for the serving of process by citation in civil cases:

(1) the owner of the property, if address is known;

(2) any secured party who has registered his lien or filed a financing statement as provided by law; and

(3) any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the Texas Department of Public Safety has knowledge.

* * * * * * * * * * * * * * * * *

Sec. 5.05(a) amended by Acts 1979, 66th Leg., p. 60, ch. 37, § 2, eff. Sept. 1, 1979; Sec. 5.05(b) amended by Acts 1979, 66th Leg., p. 165, ch. 90, § 7, eff. May 2, 1979.

Replevy of seized property

Sec. 5.06. Any property, other than a controlled substance or raw material, or money derived from the sale, manufacture, distribution, dispensation, delivery, or other commercial undertaking violative of this Act, seized under this subchapter may be replevied by the owner, lienholder, secured party, or other party holding an interest in the nature of a security interest affecting the property, upon execution by him of a good and valid bond with sufficient surety in a sum double the appraised value of the property replevied, which bond shall be approved by the seizing officer and shall be conditioned upon return of the property to the custody of the officer on the day of hearing of the forfeiture proceeding and abide the judgment of the court.

Sec. 5.06 amended by Acts 1979, 66th Leg., p. 60, ch. 37, § 3, eff. Sept. 1, 1979.

Forfeiture hearing

Sec. 5.07. (a) An owner of property, other than a controlled substance or raw material, that has been seized shall file a verified answer within 20 days of the mailing or publication of notice of seizure. If no answer is filed, the court shall hear evidence that the property is subject to forfeiture and may upon motion forfeit the property to the state or an agency of the state or to a political subdivision of the state authorized by law to employ peace officers. If an answer is filed, a time for hearing on forfeiture shall be set within 30 days of filing the answer and notice of the hearing shall be sent to all parties.

(b) If the owner of the property has filed a verified answer denying that the property is subject to forfeiture then the burden is on the state to prove beyond a reasonable doubt that the property is subject to forfeiture. However, if no answer has been filed by the owner of the property, the notice of seizure may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture.

(c) At the hearing any claimant of any right, title, or interest in the property may prove his lien, security interest, or other interest in the nature of a security interest, to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(d) If it is found beyond a reasonable doubt that the property is subject to forfeiture, then the judge shall upon motion forfeit the property to the state or an agency of the state or to a political subdivision of the state authorized by law to employ peace officers. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party, or other person holding an in-

terest in the property in the nature of a security interest is greater than or equal to the present value of the property, the court shall order the property released to him. If such interest is less than the present value of the property and if the proof shows beyond a reasonable doubt that the property is subject to forfeiture, the court shall order the property forfeited to the state or an agency of the state or to a political subdivision of the state authorized by law to employ peace officers.

(e) Upon petition of the seizing officer, filed in the name of the State of Texas with the clerk of the district court of the county in which the seizure of any controlled substance or raw material is made, the district court having jurisdiction may order the controlled substance or raw material summarily forfeited except when lawful possession and title can be ascertained. If a person is found to have had lawful possession and title prior to seizure, the court shall order the controlled substance or raw material returned to the owner, if the owner so desires.

TEX. ALCOHOLIC BEV. CODE. ANN. § 103.03, 103.04, 103.16 and 103.17 (Vernon 1978), provides:

§ 103.03. Seizure of Illicit Beverages, Etc.

A peace officer may seize without a warrant:

(1) any illicit beverage, its container, and its packaging;

(2) any vehicle, including an aircraft or watercraft, used to transport an illicit beverage;

(3) any equipment designed for use in or used in manufacturing an illicit beverage; or

(4) any material to be used in manufacturing an illicit beverage.

§ 103.14. Institution of Suit for Forfeiture.

(a) The attorney general or the county or district attorney in the county in which a seizure is made shall institute a suit for forfeiture of the property or the proceeds in escrow from any sale of illicit beverages, or both, when notified by the commission or by the seizing officer that a seizure has been made under Section 103.03 of this code.

(b) The forfeiture suit shall be brought in the name of the State of Texas against the property or the proceeds in escrow, or both, and shall be brought in a court of competent jurisdiction in the county in which the seizure was made.

§ 103.16. Forfeiture of a Seized Vehicle

(a) In a suit for forfeiture of a vehicle seized under Section 103.03 of this code, the state shall have the burden of proving that the vehicle was used to transport an illicit beverage and that all intervenors under Subsection (b) of this section, if any, knowingly violated some provision of this code.

(b) Any person with an ownership or security interest in the vehicle may intervene in the suit for forfeiture to establish his rights. An intervenor under the provisions of this section has the burden of proving that he has a valid ownership or security interest in the vehicle.

(c) If the state fails to prove that the vehicle was used to transport an illicit beverage, the court shall render judgment returning the vehicle to the owner.

(d) If the state proves that the vehicle was used to transport an illicit beverage and that all intervenors, if any, knowingly violated some provision of this code, the court shall render judgment forfeiting the vehicle to the state.

(e) If the state proves that the vehicle was used to transport an illicit beverage but fails to prove that any intervenor knowingly violated some provision of this code, the court shall render judgment delivering possession of the vehicle to the innocent intervenor with the highest priority to possession of the vehicle.

§ 103.17. Forfeiture of Other Seized Property

(a) In any suit for forfeiture of proceeds in escrow from a sale of illicit beverages or of property other than vehicles, or both, seized under Section 103.03 of this code, the state shall have the burden of proving that:

(1) the alcoholic beverages were illicit,

(2) The equipment is designed to be used on or is used in manufacturing an illicit beverage; or

(3) the material is to be used in manufacturing an illicit beverage.

(b) If the state fails to prove the facts necessary for forfeiture, the court shall render judgment returning possession of the property or of the proceeds in escrow to the owner or the person in possession at the time of seizure.

(c) If the state proves the facts necessary for forfeiture, the court shall render judgment forfeiting the property or the proceeds in escrow, or both, to the state and ordering disposal in accordance with the provisions of Section 103.20 or Section 103.18(c) of this code.

TEX.CODE CRIM.PRO.ANN.art. 18.18 (Vernon 1977), provides:

(a) Following the final conviction of a person for possession of a gambling device or equipment, altered

gambling equipment, or gambling paraphernalia, for an offense involving a criminal instrument, or an offense involving a prohibited weapon, the court entering the judgment of conviction shall order that the machine, device, gambling equipment or gambling paraphernalia, instrument, or weapon be destroyed or forfeited to the state. If forfeited, the court shall order the contraband delivered to the state, any political subdivision of the state, or to any state institution or agency. If gambling proceeds were seized, the court shall order them forfeited to the state and shall transmit them to the grand jury of the county in which they were seized for use in investigating alleged violations of the Penal Code, or to the state, any political subdivision of the state, or to any state institution or agency.

(b) If there is no prosecution or conviction following seizure, the magistrate to whom the return was made shall notify in writing the person found in possession of the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal instrument to show cause why the property seized should not be destroyed or the proceeds forfeited.

(c) The magistrate shall include in the notice a detailed description of the property seized and the total amount of alleged gambling proceeds; the name of the person found in possession; the address where the property or proceeds were seized; and the date and time of the seizure.

(d) The magistrate shall send the notice by registered or certified mail, return receipt requested, to the person found in possession at the address where the property or proceeds were seized. If no one was found in possession, or the possessor's address is unknown, the magistrate shall post the notice on the courthouse door.

(e) Any person interested in the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal instrument seized must appear before the magistrate on the 20th day following the date the notice was mailed or posted. Failure to timely appear forfeits any interest the person may have in the property or proceeds seized, and no person after failing to timely appear may contest destruction or forfeiture.

(f) If a person timely appears to show cause why the property or proceeds should not be destroyed or forfeited, the magistrate shall conduct a hearing on the issue and determine the nature of property or proceeds and the person's interest therein. Unless the person proves by a preponderance of the evidence that the property or proceeds is not gambling equipment, altered gambling equipment, gambling paraphernalia, gambling device, gambling proceeds, prohibited weapon, or criminal instrument, and that he is entitled to possession, the magistrate shall dispose of the property or proceeds in accordance with Paragraph (a) of this article.

(g) For purposes of this article:

(1) "criminal instrument" has the meaning defined in the Penal Code;

(2) "gambling device or equipment, altered gambling equipment or gambling paraphernalia" has the meaning defined in the Penal Code;

(3) "prohibited weapon" has the meaning defined in the Penal Code.

TEX. PENAL CODE ANN. § 12.01(c) (Vernon 1974), provides:

This chapter does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt, or impose any other civil penalty. The civil penalty may be included in the sentence.

APPENDIX B

No. 78-7208-E

THE CITY OF ADDISON	)	IN THE 101ST
vs.	)	DISTRICT COURT OF
THE HONORABLE JAMES B. ZIMMERMANN	)	DALLAS COUNTY, TEXAS
	)	Filed June 13, 1979

AGREED STIPULATION OF FACTS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the plaintiff, the City of Addison, the intervenor, the State of Texas, Melvyn Carson Bruder, Don Hardy, and defendants the Honorable James Zimmermann and John Handy Jones, and agree between all the parties, acting by and through their respective attorney of record, that the following agreed stipulation of facts are true, correct and undisputed:

1. The Honorable James B. Zimmermann is and has been the Judge of Criminal District Court No. 3 of Dallas County, Texas, during the occassion that gave rise to this lawsuit.

2. The Honorable James B. Zimmermann presided over the trial and conviction of John Handy Jones for the offense of bribery.

3. Richard Sullivan is and was the Chief of Police for the City of Addison during the occasion which gave rise to this lawsuit.

4. John Handy Jones voluntarily paid to Richard Sullivan the sum of $6,400.00 for Richard Sullivan's cooperation in allowing John Handy Jones and other co-conspirators to transport marijuana, a controlled substance, by airplane into Addison Airport without

being apprehended, stopped or arrested by the Addison Police Department.

5. The $6,400.00 was not given to Richard Sullivan as a gift.

6. Richard Sullivan did not perform the services for which Jones paid him the $6,400.00.

7. John Handy Jones was arrested by Richard Sullivan and marijuana transported by airplane into Addison Airport was confiscated.

8. The $6,400.00 was turned over to the Dallas County District Attorney's Office to be used as evidence in the bribery trial of John Handy Jones.

9. During the trial in Criminal District Court No. 3 of Dallas County, Texas, the $6,400.00 was offered and received into evidence by the Assistance District Attorney representing the State of Texas as the money tendered to Richard Sullivan by John Handy Jones in the commission of the offense of bribery.

10. John Handy Jones was tried for and convicted of the felony offense of bribery in Cause No. F76-5527-PJ in the Criminal District Court No. 3 of Dallas County, Texas, said conviction now being final in all respects.

11. The Honorable James B. Zimmermann ordered the clerk of his court to obtain a safety deposit box for the retention of the $6,400.00.

12. The $6,400.00 was placed in a safety deposit box at that time and remains there at the present time.

13. Only the Honorable James B. Zimmermann and his clerk have access to the safety deposit box containing the bribe money.

14. The City of Addison through its duty authorized representative has demanded the return of the $6,400.00.

15. Melvyn Carson Bruder, through an assignment to him on the 6th day of January, 1978, a copy of which is attached hereto, marked as "Exhibit A," and incorporated by reference for all purposes of the rights of John Handy Jones to the bribe money, has demanded the $6,400.00 by way of motion for return of seized property filed on November 18, 1977, in the Criminal District Court No. 3.

16. The State of Texas by and through her duly authorized representative has demanded the $6,400.00.

17. During the criminal investigation of Cause No. F76-5527-PJ, the City of Addison incurred expenses in the amount of $5,500.00.

18. It is further agreed and stipulated by each of the parties that additional facts or findings may be presumed or inferred when such fact or findings are necessarily and reasonably implied from those expressly stipulated.

Respectfully submitted,
by /s/ Melvyn Carson Bruder
Attorney for John Handy Jones
by /s/ George Preston
Attorney for Melvyn Carson Bruder
by /s/ Robert L. McCallum
Attorney for the City of Addison, Texas
by /s/ J. T. Langford
by /s/ Michael Sutton
Assistant District Attorneys
Dallas County, Texas
Attorneys for the State of Texas,
The Honorable James B. Zimmermann
and Don Hardy

EXHIBIT "A"

STATE OF OKLAHOMA)
) ASSIGNMENT
COUNTY OF _____)

My name is John Handy Jones and I currently reside at the Federal Correctional Institution at El Reno, Oklahoma.

In consideration of services rendered and to be rendered to me by Melvyn Carson Bruder of Dallas, Texas, I hereby assign all my right, title and interest in all that certain sum of current money of the United States of America, in the approximate amount of Six Thousand, Five Hundred Dollars ($6,500.00), which was introduced in evidence during the trial of Cause No. F76-5527-J, styled The State of Texas v. John Handy Jones, in Criminal District Court No. 3 of Dallas County, Texas, in August and September 1976, to the said Melvyn Carson Bruder, and I hereby release the custodian of said money from any liability. It is therefore my order that the custodian of said money deliver same immediately to the said Melvyn Carson Bruder. I further state on my oath that I am the owner of the money described above.

_____

/s/ JOHN HANDY JONES

SUBSCRIBED AND SWORN TO before me by the said John Handy Jones on this the 6 day of January, 1978, before me, the undersigned authority.

/s/ illegible
Notary Public in and for
_____ County,
Oklahoma

A true copy I certify.
/s/ Barbara McGuffin
Notary Public In and For
Denton County, Texas

APPENDIX C

Bruder v. State

601 S.W.2d 102

Melvyn Carson BRUDER, Appellant,

v.

STATE of Texas, Appellee.

No. 20255.

Court of Civil Appeals of Texas,
Dallas.

May 16, 1980.

Rehearing Denied June 3, 1980.

Appeal was taken from judgment of the 101st District Court, Dallas County, J. Roll Fair, J., in a dispute as to who was entitled to money used in attempt to bribe a police officer. The Court of Civil Appeals, Carver, J., held that money could not be recovered by assignee of the briber.

Affirmed.

Assignments 90

Money used in an attempt to bribe a police officer could not be recovered by assignee of the briber; since briber who himself had no claim to bribe money, his assignee could make no better claim.

George A. Preston, Jackson & Levy, Denton, for appellant.

Henry Wade, Dist. Atty., Maridell Templeton, Asst. Dist. Atty., Dallas, for appellee.

Before ROBERTSON, CARVER and HUMPHREYS, JJ.

CARVER, Justice.

This case concerns the disposition of money that was used in an attempt to bribe a police officer. The trial court denied recovery of the money to an assignee of the briber. We affirm and hold that the briber's assignee has no claim to the money.

The case was tried on stipulated facts. John Handy Jones paid Richard Sullivan, the Chief of the Addison Police Department, $6,400 in exchange for Sullivan's cooperation in allowing Jones and others to bring marijuana by airplane into the Addison airport without police intervention. Rather than performing the requested service, Sullivan arrested Jones. Jones was tried and convicted on the offense of bribery. The $6,400 had been turned over to the Dallas County District Attorney's office and was introduced as evidence at Jones' trial. Subsequent to his conviction, Jones assigned his asserted right in the money to Melvin Carson Bruder, appellant. In July 1978, the City of Addison sued the trial judge, the Honorables James B. Zimmerman, to obtain possession and title of the money. In August 1978, both Bruder and the State of Texas, appellee, intervened, each claiming title to and the right of possession in the money. Bruder's claim was based solely on the assignment. The trial court rendered judgment in favor of the State, and only Bruder appeals.

Bruder argues that he had a right to the money but that he was denied recovery because the trial court "forfeited" his right. Bruder points out that the judgment of forfeiture of the trial court is void under Tex. Const. art. II, § 1, and art. I, § 19, and Tex. Penal Code Ann. § 12.01 (Vernon

1974). We do not reach a discussion of the "forfeiture" issue because we find that Bruder is barred from establishing any right to the money.

Bruder's claims necessarily rely upon each and every fact set out in the stipulation of facts. In a case substantially identical to the one at bar, *Heard v. Denman,* 29 S.W.2d 824 (Tex.Civ.App. – Austin 1930, no writ), the court said:

> [T]he law is well settled that no legal right arises out of an unlawful act; and no action can be maintained upon a claim arising out of or based upon an illegal act, if plaintiff must rely in any way upon the illegal transaction to make out or establish his case.
>
> In the instant case plaintiff's only cause of action admittedly arose out of his attempt to bribe two witness, an offense constituting a felony. It is wholly immaterial that they failed to carry out their agreement. His offense was complete whether they appeared and testified, or failed to appear and testify, against him. He can assert no cause of action based upon his payment of money, which not only in itself constituted a felony, but which payment was designed to induce those who received it to likewise commit a felony. [Citations omitted.]

See also Dufek v. Harrison County, 289 S.W. 741 (Tex.Civ.App.—Texarkana 1926, no writ); Annot., 60 A.L.R.2d 1273 (1958). Because, under the stipulated facts and the application of *Heard v. Denman,* Jones could assert no claim to the bribe money itself, we hold that Bruder, as Jones' assignee, can make no better claim than his assigner. *See Beavers v. Consolidated Oil Co. of Texas,* 31 S.W.2d 876 (Tex.Civ.App.—Amarillo 1930, writ dism'd).

We do not pass upon any other party's claim, or possible claim, to the funds in question since these issues have not been presented to or argued in this court. Our opinion is limited to the claim of Bruder.

Affirmed.